IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES, *Petitioner*,

v.

THE STATE OF TEXAS, *Respondent*.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AS *AMICI CURIAE*

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March 22, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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This brief is filed with the written consent of the parties pursuant to Rule 42 of this Court.

INTEREST OF *AMICI CURIAE*

The National Association of Broadcasters (NAB) is a non-profit organization of radio and television broadcasters whose membership included as of March 17, 1965, 2140 AM stations, 837 FM stations, 461 television stations and all the radio and television nationwide networks. This brief is submitted by NAB in furtherance of the objective of the Association which in accordance with its by-laws:

> ". . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

The Radio Television News Directors Association (RTNDA) is a non-profit organization of radio and television news directors which also embraces an associate membership of persons actively engaged in the reporting, writing or editing of news for radio and/or television. It has approximately 700 active and associate members. The general purpose of RTNDA, as stated in its constitution, is to advance "radio and television news media and our common rights to the Freedom of Speech and the Freedom to View and Listen."

The fundamental issues which are to be reviewed in this case are of vital concern not only "to the American Bar Association and its nearly 120,000 members" (Brief at p. 2) but to nearly 200,000,000 Americans. Today, the burden of being the primary source of

news to most of the people in this country has shifted from the newspapers to broadcasting.[1] In spite of this reliance by a majority of Americans on radio and television for their news, however, most of the courts are still closed to microphones and cameras.

For ten years NAB and, more recently, RTNDA have sought without success to convince the American Bar Association (ABA) that it should explore further the feasibility of broadcasting trials. The most recent effort was a proposal by both associations that they cooperate with the ABA in the establishment of committees composed of representatives of bench, bar and media to conduct a series of tests on a nationwide basis in an effort to obtain a functional appraisal of some of the problems inherent in court coverage. This offer, which is reprinted as Appendix A, was rejected by the ABA.

ARGUMENT

Preliminary Statement.

The primary concern of all must be the proper administration of justice. To insure its achievement, our system of government relies not only upon the bench and bar but also upon the general public. The enlightenment of the populace through meaningful access to courtroom proceedings is an historically-created check upon the maladministration of justice. What courts do is not just the business of the bench and the bar. It is a prime concern—a first responsibility—of the whole body politic. To this end the law must fully avail itself of all improved means of communication.

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[1] Elmo Roper & Associates, NEW TRENDS IN THE PUBLIC'S MEASURE OF TELEVISION AND OTHER MEDIA 2 (1964).

There are several basic propositions with which broadcasters fully agree:

—That the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media;

—That the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial;

—That, to assure a fair trial, it is the duty of the presiding judge to preserve order in the courtroom; to anticipate and prevent so far as he can any conduct which would be calculated to create disorder; and that he has inherent power to do so.

This then brings us to the area of disagreement with those who would assume that the presence of broadcasters in the courtroom is incompatible with these fundamental provisions.

This Court is being asked by the ABA to go beyond the precise question and the factual situation in the case at bar; to elevate Canon 35 to a constitutional mandate; and to reach an inflexible determination that the administration of justice cannot accommodate itself to the most modern means of communication without violating the defendant's right to a fair trial. NAB and RTNDA will demonstrate in this brief that no such blanket holding is warranted but, on the contrary, that broadcast reporting of court proceedings, subject only to proper controls by the trial judge, is not only fully compatible with the defendant's right to a fair trial but also promotes positive public benefits as envisioned by the framers of the Constitution.

I. Courtroom Reporting By Broadcast Media Is an Implicit Element in Our Constitutional System and Promotes the Administration of Justice.

A cardinal purpose of any civilized society is to secure the safety of its people. A free and democratic system adds the purpose of fostering individual liberty. Our government safeguards an individual in the assertion of his rights only so long as he does not impair the safety of society or the liberties of any other individual. The liberty and safety of each person is equally important. These elementary principles are perforce applicable to criminal trials. Involved in every criminal case are the safety and liberty of the society which the defendant is alleged to have offended and the defendant's personal liberty and right to a fair trial. The fair administration of justice commands "that guilt shall not escape or innocence suffer."[2]

The immediate effectuation of these precepts has been entrusted to a variety of governmental organs—committing magistrates, grand juries, prosecutors, petit juries, trial courts, appellate courts, etc. Unfortunately, however, history has taught that courts and officers of the law are not perfectly competent or always incorruptible. And it is also true that maladministration of justice is not uniformly adverse to the defendant but frequently operates to his benefit and adverse to the interests of society. The disposition of many charges brought against whites for crimes committed towards Negroes in certain sections of this country illustrates this truth.

To aid in the prevention of miscarriages of justice, our constitutional system of government has created

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[2] Berger v. United States, 295 U.S. 78, 88 (1935).

a court of ultimate review—the people acting through the force of public opinion and as an informed electorate. As Mr. Justice Frankfurter observed in *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 920 (1950):

> "One of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."

And, as Mr. Justice Black stated in *Barr* v. *Matteo,* 360 U.S. 564, 577 (1959):

> "The effective functioning of a free government like ours depends largely on the force of an *informed public opinion.* This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such *an informed understanding* depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important." [Emphasis added.]

In order for the people to adequately perform this function, their information must be as complete and accurate as is possible. The more facts that are available, the greater certainty that public opinion and action will be well-considered and effectively directed towards promoting the fair administration of justice. But all of the people can never be present to observe the factual events upon which they are to base their judgments. They must depend upon conduits—other individuals, magazines, newspapers, radio and television. To the extent, then, that these agents of public information are hindered in the performance of their

critical tasks, the people are less competent to fulfill their role as the court of ultimate review.

We submit that the framers of the Constitution recognized the critical importance of these agents by providing for freedom of speech and press in the First Amendment and by opening criminal trials to the public in the Sixth Amendment. While neither of these two amendments speaks of an unlimited right of access to the courtroom on the part of the broadcasting media, it is clear that their underlying purposes will be subverted unless radio and television are permitted to present live coverage of judicial proceedings subject only to those reasonable controls necessary to prevent *clearly demonstrated* intrusions upon the fair administration of justice. Of course, we do not contend that the broadcasting media possess a right of access to governmental proceedings or private meetings that lawfully bar the public.[3] We do urge, however, that the broadcasting media have a right to be present at, and to transmit from, all proceedings which are open to the public. This right is a reflection of the societal interests underlying the First and Sixth Amendments.

These societal interests are a general interest in enlightenment and an interest in preventing judicial abuse of the public's and the defendant's right to a fair trial. Both the advancement of knowledge and the requisite critical discussion of the performance and qualifications of public officials in all branches of our government presuppose the ability to gather

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[3] This Court has consistently held that constitutional rights, including freedom of the press, are not absolute. E.g., Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937); Associated Press v. United States, 326 U.S. 1, 19-20 (1945); American Communications Ass'n, CIO v. Douds, 339 U.S. 382, 394 (1950).

information. "An informed understanding" cannot be built upon surmise or conjecture. The process of news dissemination necessitates the acquisition of facts, their sifting and analysis, and their publication and distribution. Each one of these functions is an integral part of the total process. The capacity to discover and gain access to information, therefore, is vital to the protection of the public's interest underlying the First[4] and Sixth Amendments.

As this Court stated in *In re Oliver*, 333 U.S. 257 (1948):

> "[T]he guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270.
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> "Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony.[5] . . . (2) The spectators learn

[4] The Petitioner has conceded "that an unreasonable restriction upon obtaining information by the public would be fairly included in the abridgement of free speech, and of the press, proscribed by the First Amendment." Brief at p. 7. See also *id.* at p. 36 where the Petitioner states: "We believe the right to 'know' and to 'find out' information regarding a criminal case is part of the first amendment guarantee of 'free speech.' Otherwise speech would be mere gossip or 'tittle-tattle.'"

[5] Wiggins, FREEDOM OR SECRECY 36 (Rev. ed. 1964) details an instance in which newspaper publicity caused a criminal to surrender during the trial of one wrongly accused of the same crime (after the trial court had denied defendant's motion that the press be excluded).

about their government and acquire confidence in their judicial remedies." *Id.* at 270 n.24.

Professor Wigmore cited additional societal benefits flowing from the Sixth Amendment. He noted that a public trial is security for testimonial trustworthiness and that, in acting under the public gaze, judge, jury and counsel are more strongly moved to a strict conscientiousness in the performance of duty. 6 Wigmore, EVIDENCE § 1834 (3d ed. 1940). This Court has recently indicated that the public's interest in a public trial is a shared right with the right of the defendant. In *Singer* v. *United States,* No. 42, Oct. T., 1964, decided March 1, 1965, this Court, in denying the existence of an absolute right in the defendant to compel a bench trial without approval of the court and consent by the government, stated (Slip Op. p. 11):

> "[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli,* 172 F. 2d 919, 924 (C.A. 3d Cir. 1949) (by implication) ....."

The Court of Appeals in *Kobli* at the page cited by this Court stated:

> "While, as has been suggested, the right thus accorded to members of the public to be present at a criminal trial as mere spectators may not be wholly logical it has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally."[6]

It can be seen that broad societal interests underlie the guarantees of a public trial and of free speech and

[6] See also Craig v. Harney, 331 U.S. 367, 374 (1947), stating that "a trial is a public event. What transpires in the courtroom is public property."

a free press. These latter rights are means through which the public is to be enlightened so that they may act to uphold their interests, as well as the defendant's interests, in the fair administration of justice. In order for these means to be effective, however, there must be something more than a mere right to be present. Obviously, only a minute segment of the public can be present at any one time. The public must depend upon other means of obtaining information. And, to the extent that such conduits as spectators or newspapers fail to convey adequate information, the public's interest are not upheld when broadcasting is barred.

Access in this modern age must include access with microphone and camera, particularly in view of the fact that more people rely upon broadcasting than upon newspapers for news.[7] These tools enable the broadcasting media to effectuate a more accurate presentation of the aural and visual events and atmosphere of a judicial proceeding than is possible through the utilization of "second-hand" methods even when the latter purport to directly quote from the proceedings. Factual reports, even if originally correct, are distorted almost in direct proportion to the number of stages of recital that are employed. Even a stenographic transcript, assuming the improbability of its wide distribution, is handicapped by its failure to produce "the sights and sounds" of the proceedings, including, importantly, the witness's demeanor.

Thus, there is a basic public interest founded in our constitutional system of government that impels the conclusion that trials should be broadcast. This does

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[7] See note 1 *supra*.

not mean that the representatives of the press (electronic or print) have a constitutional right to conduct themselves in a court room in a manner that offends the dignity and decorum of the court. Such offenses can be committed by any person present, but the court has the power to prevent such offenses.

> "An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character." *Davis* v. *United States*, 247 Fed. 394, 395 (8th Cir. 1917).

We concede the judicial power and duty to control pending proceedings so as to remove such threats to a fair trial, or to eliminate other factors that have been empirically shown to impair a fair trial. We submit, however, that the judiciary has neither a duty nor the power to impose a total *prior restraint* on the broadcasting of judicial proceedings.[8]

Furthermore, if this Court determines, as we contend that it must, that justice can be fairly administered even though cameras and microphones are pres-

[8] We are well aware that this proposition casts doubt upon the constitutionality of the judicial adoption of Canon 35 of the American Bar Association's Canons of Judicial Ethics and related rules prohibiting broadcasting of judicial proceedings. However, since Canon 35 was not utilized in the instant proceeding, a decision on the merits of the conviction below may be made without now reaching a decision upon the constitutionality of these exclusionary rules.

ent, the blanket denial of broadcast coverage by courts will be an unreasonable discrimination against broadcast journalists. There is no reason why broadcast newsmen should not be allowed to utilize their reportorial tools in situations where the newspaper reporters may use theirs. To hold otherwise would create a discriminatory classification that has no reasonable relation to the differences between the news media, and hence would be a denial of the equal protection of the laws. As this Court has stated in another context, "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

II. Reporting from the Courtroom by Camera and Microphone, Properly Controlled by the Court, Does Not Deprive a Defendant of Due Process of Law.

Petitioner and his supporting *amici curiae* argue that the mere presence of television in a courtroom prevents a fair and proper administration of justice. They conclude, without substantiation, that each of the principal trial participants—juror, judge, counsel and witness—is so likely to be adversely affected by broadcast coverage that he would be unable to function in a manner consistent with the requirements of a fair trial. This conclusion is not based on fact. Rather it is presented in a parade of conjured horrors without supporting evidence.

In the most comprehensive study concerning the effects of photography, radio and television on the judicial process, the opposite conclusion was reached by the Supreme Court of Colorado.[9] Because we believe that the report of Mr. Justice Moore, adopted

[9] In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956).

by the Colorado court, is of great importance to a fair evaluation of the merits of the question, we are attaching a copy as Appendix B. An objective appraisal of the experience and judgments set forth in the report will show the unsoundness of the argument that broadcasting court proceedings is inconsistent with the fair administration of justice.

The Colorado Supreme Court has given the trial judge discretion to determine in each case whether and under what circumstances cameras and microphones should be permitted in the courtroom. After five years of experience with Colorado's discretionary version of Canon 35, Frank H. Hall, Chief Justice of the Colorado Supreme Court, reported:

> "We have experienced no difficulties with reference to Rule 35. Though the rule has not received the blessing of the American Bar Association, we have not been urged by anyone in interest to modify or repeal any portion of it. Naturally judges make no complaint, for they have the discretion . . . . Up to the present time, no complaints have been received from litigants, lawyers, jurors or witnesses." Hall, "Colorado's Six Years' Experience Without Judicial Canon 35," 48 A.B.A.J. 1120, 1121 (1962).

Colorado was concerned with realities, not conjecture. The bench and bar did not assume *a priori* that every use of camera or microphone must in every judicial proceeding interfere with the administration of justice. As judges and lawyers, they were willing to investigate and to arrive at an empirical judgment based on the record.[10]

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[10] The ABA rejected a similar opportunity to investigate the merits of television coverage of trials. (ABA Brief pp. A-16 to A-18.) See proposal of NAB and RTNDA, Appendix A of this brief.

In every situation known to us where broadcasting of courtroom proceedings has been permitted under proper judicial control, the conclusions reached have been comparable to those set forth by the Colorado justices. For example, a murder trial was televised in Waco, Texas in December of 1955. Following the trial, all members of the Waco-McLennan County Bar Association were asked: "In your opinion, did the following detract from the dignity of the court, distract the witnesses or jury, or otherwise disrupt the orderly procedure of the trial?" The choices were: press photographers, still photographers, movie photographers, television, and spectators in court. A greater proportion of the attorneys who answered the questionnaire felt that *spectators in the courtroom interfered more with the orderly procedure of the trial than did the presence of television.* Eighty-seven percent of the attorneys who answered said that they would allow television in the courtroom and 78 percent thought that the admission of cameras ought to be left to the discretion of the judge. Wiggins, FREEDOM OR SECRECY 61 (Rev. ed. 1964).

Tabulations of answers on a ballot received from 300 attorneys and 30 judges in the State of Oklahoma in 1956 showed that 58 percent of the attorneys who had some experience with live courtroom television favored some use of it, while 36 percent of those without such experience favored it. This same trend appeared in the poll of judges: 78 percent with experience favored live courtroom television while 52 percent of those without such experience favored it.[11] These figures

[11] "Attitudes of the Legal Profession in Oklahoma Toward ABA Canon 35"—a study by Professor Sherman P. Lawton of the University of Oklahoma (1957).

imply that much of the reluctance of bench and bar to permit the broadcasting of courtroom proceedings stems from a fear of the unknown.

In the past it was often contended that broadcasting apparatus in the courtroom endangers the dignity and decorum of the court. Even the ABA has recognized that this argument is antiquated (ABA Brief, p. 23). Cameras and microphones need not be visible or audible. Since radio and television has demonstrated its ability, consistently with dignity and decorum, to present church services, deliberative sessions of the United Nations and the ABA House of Delegates, and the last homages paid to President Kennedy and Sir Winston Churchill, there is little doubt that the broadcast media can give the public access to the sights and sounds of a courtroom without disturbing the proceedings.

Presently, the chief attack against broadcast reporting from the courtroom is that such coverage adversely affects each of the principal trial participants so as to impair his ability to function in a manner consistent with the requirements of a fair trial. The parties advancing this proposition substitute assertion for facts. Moreover, most of the arguments made against the "pyschological impact" of broadcast coverage may be made in regard to newspaper coverage, yet no one seriously suggests the blanket exclusion of newspaper reporters from the courtroom.

It has been urged that the exposure of jurors to filmed or taped portions of the day's trial in nightly replays would distort their perspective. Exposure to exterior influences is just as implicit in newspaper publishing or gossip. The answer to these problems, if the judge's standard admonitions to the jury do not

suffice, is not the imposition of prior restraints upon newspaper and broadcast trial coverage, but rather the sequestration of the jury.[12]

The American Civil Liberties Union and the Texas Civil Liberties Union, as *amici curiae,* have argued (Brief at pp. 16-17) that prospective jurors would be prejudiced by courtroom telecasting in the event a new trial is ordered. But this potential prejudice is always present in a widely-publicized trial, with or without reporting of the nature under consideration here. Newspapers and magazines of great circulation provide "interpretation" which could invade the juror's province of decision-making as much if not more than could the accounts carried on television and radio.

The contention that trial judges would be pressured by the broadcast media to open the trial courts to them in every case, no matter what the special circumstances, ignores the fact that "judges are supposed to be men of fortitude, able to thrive in a hardy climate."[13] It hardly becomes the ABA to defend Canon 35 with

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[12] The *amici* supporting the petitioner's position attempt to buttress their arguments alleging prejudice flowing from the broadcasting of the trial by reference to the fact that telecasts of the two-day hearing (September 24-25, 1962) on petitioner's motion to exclude the broadcasting media might have been viewed by some of the already-impaneled jurors. ABA Brief, pp. 12-13; Brief of the American Civil Liberties Union and the Texas Civil Liberties Union, pp. 11-14. Assuming *arguendo* that a juror did witness a re-run of this preliminary proceeding, it is crucial to note that not one single piece of evidence was introduced until much later, after the State's opening argument delivered on October 22. Since the jury was sequestered without access to radio or television from October 22 until their verdict was rendered, no extra-judicial evidence could have possibly prejudiced any juror.

[13] Craig v. Harney, 331 U.S. 367, 376 (1947).

forebodings that, unless that Canon is enforced by the Supreme Court, judges and counsel will violate other more basic ethical standards of the legal profession. The suggestion that a judge will act contrary to the interest of justice if his person is being viewed by a large audience is both farfetched and insulting to the judiciary. The contention that a prosecutor or defense counsel might be led to posture before the cameras to the detriment of interests he represents is not only degrading to the great mass of the bar but it is also illogical. It is extremely doubtful that even the most publicity-conscious and egotistical attorney would strut and orate any more or less before a camera or microphone than he would before newspaper reporters, the jury and other spectators. Moreover, since losing the case would not enhance his reputation, we must assume that he would perform in a manner which he deemed most consistent with making the optimum appeal to the trier of the facts rather than to the radio and television audience.

It has been argued that counsel and witnesses will be under undue pressure by the knowledge on their part that they are performing before a large unseen audience. Any effect on counsel or witnesses which might result from the addition of an unseen audience is purely conjectural. It is not uncommon today to find microphones and taperecorders in courtrooms for purposes of amplification and recording. Moreover,

> "... [O]ur judicial history is not barren of experience with a sudden and very substantial audience increase. Early in the nineteenth century, news of what went on at a court trial was dependent upon the hurried notes and the recollections of the newsmen who were present. In the forties, shorthand was invented, and, before long, accurate

word-by-word reports of the testimony could be published. The number of the audience was thus multiplied many fold. But this development did not lead to the adoption of canons of ethics decrying the practice as improper. The effect of this new practice was similar in many ways to what would happen now if broadcasting were allowed, but the change then was not so pinpointed in the time of its advent, and it was not so dramatic." Lyman, "Courts, Communications and Canon 35," 46 A.B.A.J. 1295, 1297 (1960).

To the extent that there is theoretically any impact upon counsel or witnesses because of the novelty of a new reporting device, the impact would dissipate as the novelty wears off.

In the final analysis, the problem of broadcast coverage of courtroom proceedings is not essentially different from other problems of maintaining proper decorum in the courtroom. The trial judge, empowered with the authority to control conduct in his courtroom so as to insure the proper administration of justice, is the person to determine when a situation exists that would preclude a fair trial. His function would be no different with respect to abuses by broadcast media than with other media and spectators. There is no problem of lack of uniformity in proposing this case-by-case method because the purpose is to prevent abuses in light of the circumstances of the particular case. The trial judge, within his discretion, can set the proper requirements to fit the needs of the individual case; some situations will require more control than others.

Inside the courtroom, broadcast newsmen and technicians are under the supervision of the court, and

the judge may lay down explicit ground rules of pictorial and sound coverage in order to avoid any interference with the proceedings. The judge (and counsel) need give little or no attention to the cameras and microphones once these ground rules are established, unless unusual circumstances arise after the trial has begun.

Whatever doubts this court may have about the wisdom of broadcast coverage of trials in general[14] or about this case in particular, the Court should not accept the ABA's argument that radio and television coverage of trials must be subjected to a blanket condemnation even though properly controlled by the trial court. Such a condemnation is not required under any of the standards enunciated by this Court. Properly controlled coverage does not create a "probability of unfairness," *In re Murchison,* 349 U.S. 133, 136 (1955); nor is there "manifest error" because the proof of unfairness is "clear and convincing," *Irvin* v. *Dowd;* 366 U.S. 717, 723, 725 (1961); nor is this a case where "the conclusion cannot be avoided" that the courtroom trial in such circumstances is "but a hollow formality," *Rideau* v. *Louisiana,* 373 U.S. 723, 726 (1963).

Writing for a unanimous Court in *Holt* v. *United States,* 218 U.S. 245, 251 (1910), Mr. Justice Holmes rejected a defendant's allegations of prejudicial newspaper publicity by noting that "if the *mere opportunity* for prejudice or corruption is to raise a pre-

[14] The principal arguments relied upon to attack the presence of television and radio in trial courts are almost completely inapplicable to appellate court proceedings. In the latter, there are no jurors to be improperly influenced, no witnesses to be unnerved, and even less possibility that, in the quiet atmosphere provided for appellate advocacy, the judges and counsel will play to the galleries.

sumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."[15] Therefore, Petitioner is incorrect in stating that "it is enough to condemn the practice if there is a real *possibility* this may be the *occasional* result." (Brief at p. 12; emphasis added.) The proponents of Canon 35 have the burden of proving that unless the Canon is enforced a defendant is denied due process of law. This burden has not been met.[16]

The Court should not clothe this ABA rule in the majesty of the Constitution when the premises of the rule are, at the least, open to serious question. This is not a case like *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963), in which the Court could state that it is an "obvious truth" that a poor person cannot be assured of a fair trial unless counsel is provided for him. In the case at bar, the existence of any harm caused by broadcast reporting has not been established. On the contrary, the countervailing constitutional and social interests in favor of broadcasting courtroom proceedings have been clearly demonstrated. If, on this record, the Court raises Canon 35 to the level of a constitutional mandate for all cases, many of the important questions of fact remaining to be answered will probably forever go unanswered.

We urge the Court to reaffirm its position as stated in *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956):

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it

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[15] [Emphasis added.], *quoted in* United States ex rel. Darcy v. Handy, 351 U.S. 454, 462 (1956).

[16] *Cf.* Swain v. Alabama, No. 64, Oct. T., 1964, decided March 8, 1965.

is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' "[17]

Conclusion

For the reasons stated, we respectfully submit that the Court should hold that broadcast reporting of court proceedings is an implicit element of our constitutional system, promotes the administration of justice and, properly controlled, is consistent with the right to a fair trial.

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[17] This proposition was restated in Beck v. Washington, 369 U.S. 541, 558 (1962), like *Handy*, a case of allegedly prejudicial pre-trial newspaper publicity.